United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2693

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

v.

GUY DIGIROLAMO, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES

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I N D E X

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ISSUES PRESENTED

1. Whether the evidence which rested in large part on the testimony of key witness Harvey Adam was sufficient to sustain the conviction.

2. Whether Harvey Adam was competent to be a witness.

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut (Hon. Robert C. Zampano, U.S.D.J. presiding), appellant DiGirolamo (hereinafter the "defendant") was convicted of aiding and abetting the use of extortionate meansto collect an extension of credit from Harvey Adam on or about June 1, 1973, in violation of 18 U.S.C. 894 and 2 (count 6) and of conspiring with Carl Alteno to use extortionate means to

collect an extension of credit from Harvey Adam in violation of 18 U.S.C. 894 (count 7) (D. App. 2a-3a).[1/] He was sentenced to a thirty-month term of imprisonment on the substantive count, imposition of sentence on the conspiracy count was suspended and a three-year term of probation, to run consecutively with the term of imprisonment, was imposed.

1. The evidence at trial showed that during 1972 in Bridgeport, Connecticut, one Harvey Adam engaged in several wagering transactions related to sporting events with the defendant's brother Angelo DiGirolamo and that in October of 1972, Angelo owed Adam a debt of $11,000 (Tr. 40-43, G. App. 28-31).

Adam then began to wager with the defendant known as "Tok," and by January 1973, had lost $10,000 (G. App. 30-32; Tr. 42-43, 317-323). When the defendant attempted to collect the debt, Adam

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1/ The seven-count indictment filed on July 24, 1973, charged the defendant with three substantive and one conspiracy offenses in violation of 18 U.S.C. 894, 2. The defendant was found not guilty on one substantive count and a second substantive count was dismissed when the jury could not reach agreement on it. The indictment also charged one Carl Alterio with three substantive and one conspiracy offenses in violation of 18 U.S.C. 894. Carl Alterio (who was tried with appellant) changed his plea to guilty on two substantive counts the second day of the trial. He was sentenced to a fifteen-month term of imprisonment on one count, imposition of sentence on the other count was suspended and a two-year term of probation, to run consecutively with the term of imprisonment, was imposed. The remaining two counts against Alterio were subsequently dismissed.

suggested a set-off against the amount owed Adam by the defendant's brother, but the set-off was rejected (Tr. 43-44; G. App. 32-33). During February and March of 1973, the defendant contacted Adam several times to determine if Adam was able to pay the debt (Tr. 43-44; G. App. 32-33). In April of 1973, after Adam sold some land holdings, the defendant demanded payment out of the proceeds of the land sale but Adam delayed by stating that the money was tied up in a divorce proceeding (Tr. 44-48; G. App. 33-37).

On May 11, 1973, the defendant told Adam by telephone that he must start paying the debt "even if you go steal me from your father" or that he would get his "brains busted by Carl" (Tr. 48, 156, 261; G. App. 37, 81, 89). Thereafter, Carl Alterio visited Adam at his place of business and told him that he had to "pay something," that "Tok sent me up here to get anything, a hundred dollars I supposed to give him, . . ." (Tr. 48-63; G. App. 37-52) or he "was going to get hurt" (Tr. 53; G. App 42). Following this conversation, Adam contacted Agent James McNamara of the FBI. 2/

2/ Adam was subsequently contacted by Carl Alterio and the defendant at other times during May of 1973 (Tr. 15-21, 64-65, 69, 145, 159, 296-303; G. App. 53-54, 58, 76, 84) in conjunction with Alterio's efforts to collect the debt owed the defendant (Tr. 145, 159, 269; G. App. 76, 84, 97).

During the last week in May, the defendant called Adam and told him that if he "didn't have something for Carl that Friday," Adam was "going to get [his] brains kicked in" (Tr. 264; G. App. 92). On June 1, 1973 (the date of the substantive violation) the defendant called Adam and told him that Carl's coming up, and I can't control him any more (Tr. 70; G. App. 59), that Adam was "going to have to pay this," that Adam "was going to have [his] legs broken" (Tr. 266; G. App. 94), and that if he did not give Carl something, "you are going to get busted up" (Tr. 285; G. App. 100).

Adam again contacted Agent McNamara who, with three other agents, went to Adam's place of business and placed a recording device on Adam's person in anticipation of Carl Alterio's visit (Tr. 70-73, 22-31; G. App. 14-23, 59-62). When Alterio arrived that evening, two agents observed from an automobile while the other two agents operated[3/] the recording device inside the building (Tr. 23-24; G. App. 15-16).

During the recorded conversation, Alterio told Adam that he had come to collect something on the $10,000 that Adam owed to the defendant and that he was going to "rack you're fucking brains in" (Tr. 293-294; G. App. 3-13, 108-109).

3/ Thereafter, Adam was contacted three times concerning the collection of the debt, once by the defendant (Tr. 81-84; G. App. 70-73) and twice by Carl Alterio (Tr. 79; G. App. 68).

2. Harvey Adam's testimony was presented to the jury on Wednesday, August 14, and Thursday, August 15, 1974. Following the conclusion of his testimony, Adam was found asleep in the office of the United States Attorney by FBI Agent McNamara. When Adam was awakened, he acted disoriented and did not recognize the agent. Adam told the agent that he had been taking prescription drugs under a prescription from Dr. D' Apice, a psychiatrist and that he had taken drugs in excess of the prescribed dosage during the trial (Tr. 366-379; G. App. 156-170).

The following Tuesday, the prosecutor informed the court and defense counsel of this occurrence and that Dr. D'Apice was to be produced as a witness. The court concluded that testimony from Dr. D'Apice should be heard concerning Adam's condition and gave defendant the option of hearing from D'Apice either as a court, prosecution or defense witness. Defendant then decided to call Dr. D'Apice and the agent as his defense witnesses (Tr. 353-366; G. App. 149-156). The agent testified about finding Adam in the United States Attorney's office and then D'Apice was called as a defense witness. These were the only witnesses called by the defense.

Dr. D'Apice's testimony may be summarized as follows: Harvey Adam had visited him for treatment six times from July 8, 1974, to August 20, 1974 (Tr. 386; G. App. 176). He had complained

of hearing noises, music and buzzing sounds, worries over personal and business problems (Tr. 391, G. App. 181), delusions, and an inability to cope with his problems and that he had taken amphetamines (Tr. 397; G. App. 187). Dr. D'Apice made a diagnosis of "psychotic depressive reaction" (Tr. 389, G. App. 179), and Dr. D'Apice described the symptoms as poor memory and concentration, reality distortion and paranoia (Tr. 392-395; G. App. 182-185). He said in response to a hypothetical question that if Adam were having delusions of persecution and while testifying, he then would not appreciate the meaning of an oath (Tr. 395-396; G. App. 185-186) but that it was his opinion that Adam could recall matters of importance in his life and truthfully testify to that recollection (Tr. 428-429; G. App. 218-219). Dr. D'Apice also stated that despite Adam's depressed state he could relate to the world and would know what was going on around him (Tr. 421; G. App. 211). He said that Adam was currently taking three prescription drugs which he described as major antidepressants and side reaction prevention drugs (Tr. 405; G. App. 195). Dr. D'Apice stated that Adam was in "much better" condition now than in July (Tr. 409; G. App. 199), that the drugs eased his stress and enabled him to function in a more balanced fashion (Tr. 410-413, G. App. 200-203) and that the probability was that taking the prescribed drugs would have

eased Adam's stress in testifying (Tr. 424; G. App. 214). Dr. D'Apice further stated that if he had been informed of Adam's intent to testify in a major criminal case he would have advised against testifying only because of the stress which the situation would place on Adam but for no reasons "to do with the court" (Tr. 438-439; G. App. 228-229).

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN THE CONVICTION

Although the defendant concedes that "It is not disputed that Adam owed the defendant $10,000. Nor is it disputed that Alterio sought to collect partial payment of that debt and there is sufficient evidence to establish that Alterio threatened Adam." (Brief 15), he maintains that the evidence did not support his conviction for aiding and abetting the use of extortionate means to collect the debt on June 1, 1973, and conspiracy to commit the substantive offense. The evidence adduced at trial if competent, an issue which we considered below, clearly supports the jury's finding of guilt.

a. Briefly, the evidence detailed in the statement shows that in 1972 Harvey Adam owed the defendant $10,000, and that in the last week in May, the defendant called Adam and told him that if he "didn't have something for Carl [Alterio] that Friday,"

Adam was "going to get [his] brains kicked in" (Tr. 264; G. App. 92). On June 1, 1973, the defendant again called Adam and told him that he was "going to have to pay this," that Adam "was going to have [his] legs broken" (Tr. 70, 266; G. App. 59, 94), that Carl is coming up, and I can't control him anymore," (Tr. 70; G. App. 59), and that "If you don't give him something, you are going to get busted up." (Tr. 285; G. App. 100). Thereafter, in a conversation that was recorded and played before the jury, Alterio told Adam that he worked for "Tok"; that "You owe 10,000 * * * dollars." * * * "He told me to come up here and get it; That's what he told me"; that * * * "He wants his money, that's what he wants"; that "Tok don't care" how the debt was to be paid and that "He told me to come up here . . . to collect the * * * money." (G. App. 3-13). And, as defendant concedes, Alterio threatened Adam.

This evidence clearly provided a factual foundation from which the jury could justifiably infer that the defendant had "in some sort associate[d] himself with the venture, that he participate[d] in it as in something that he wishes to bring about he seek by his action to make it succeed" Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), quoting L. Hand, J., United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938). This evidence, together with all legitimate inferences that may be

drawn from it (United States v. Marrapese, 486 F.2d 918, 921 (2nd Cir. 1973), cert. den., 415 U.S. 994 (1974)) viewed in the light most favorable to the government was sufficient to enable a reasonable mind to fairly reach a conclusion of guilt beyond a reasonable doubt and was therefore sufficient to sustain the defendant's conviction. See United States v. Tramunti, 500 F.2d 1334, 1338 (2nd Cir. 1974); United States v. Freeman, 498 F.2d 569, 571 (2nd Cir. 1974); United States v. Taylor, 464 F.2d 240, 243 (2nd Cir. 1972).

b. As for the contention that Adam's testimony was incredible as a matter of law, the trial court properly regarded the testing of the credibility of Harvey Adam's testimony as within the province of the jury. "The established safeguards of the Anglo American Legal System leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." Hoffa v. United States, 385 U.S. 293, 311 (1966); United States v. Mallah, 503 F.2d 971, 981 (2nd Cir. 1974). Accordingly, under settled principles, a judge may not assess the credibility of witnesses in ruling on a motion for judgment of acquittal under Rule 29 F.R.Crim.P. See, e.g., United States v. Weinstein, 452 F.2d 704, 713-714 (2nd Cir. 1971), cert. den., sub nom. Grunberger v. United States, 406 U.S. 917 (1972); Kroll v. United States, 433 F.2d

F.2d 1282, 1285 (5th Cir. 1970), cert. den., 402 U.S. 944 (1971); United States v. Gross, 375 F. Supp. 971, 973 (D.N.J. 1974). It is the province of the jury to weigh the credibility of witnesses. United States v. Rosenberg, 195 F.2d 583, 592 (2nd Cir. 1952). See, United States v. Stanley, 433 F.2d 637, 638-639 (5th Cir. 1970). Even if the witness's testimony is impaired, the jury has the right to believe all or so much of it as they think proper. United States v. Luciano, 343 F.2d 172, 173 (4th Cir. 1965), cert. den., 381 U.S. 945 (1966).

Nor does the defendant's attack on the testimony of Adam warrant an exception to these principles (Brief 7-10).[4/]

4/ The defendant's description of Harvey Adam's testimony (Br. 7-8) as inconsistent, contradictory and infected with lapses of memory is not supported by the record as a whole. Adam did recall information concerning his betting habits (Tr. 128-131) and testified that he lost the $10,000 in bets placed with the defendant prior to January 1973 (Tr. 39-44; G. App. 28-33). Adam was able to specifically recall the dates involved in the indictment and the content of the threats made by the defendant and Carl Alterio (Tr. 48, 53, 63, 70, 145, 156, 261, 264, 266, 285; G. App. 37, 42, 52, 59, 76, 81, 89, 92, 94, 100). Moreover, the record shows that Adam did relate the name of Mancini, the person against whom he had previously testified (Tr. 124) in addition the June 1 recorded conversation (G. App. 3-13) corroborates his claims that threats were used to collect the debt that he owed appellant.

A similar claim was made and rejected by this Court in United States v. Weinstein, supra. There the trial judge set aside a jury verdict of guilty because he felt that a key government witness, one Berger, was "not worthy of belief" and could not "distinguish between fact and falsity when his own interests are at stake." Specifically, the district judge found the witness unbelievable because of material conflicts between his testimony at trial and his testimony at an earlier proceeding. In reversing the trial court's action, this court said (452 F.2d at 713-714):

> To be sure, there were unusually strong grounds for not believing Berger. But that decision was the jury's function, not the judge's. . . . The maxim "Falsus in uno, falsus in omnibus" has been well said to be itself "absolutely false as a maxim of life." 3A Wigmore, Evidence § 1008 at 982 (Chadbourn rev. 1970). The correct principle was stated by Judge Campbell more than a century ago:
>
> > There has never been any positive rule of law which excluded evidence from consideration entirely, on account of the wilful falsehood of a witness as to some portions of his testimony. Such disregard of his oath is enough to justify the belief that the witness is capable of any amount of falsification, and to make it no more than prudent

> to regard all that he says with strong suspicion, and to place no reliance on his mere statements. But when testimony is once before the jury, the weight and credibility of every portion of it is for them, and not for the Court to determine

Again, as the Supreme Court pointed out in Hoffa, supra, searching cross-examination and a properly instructed jury are the safeguards against convictions based on lying testimony. 385 U.S. at 311. Here, the witness Harvey Adam was subjected to lenghty and rigorous cross-examination by defense counsel (Tr. 84-260) and the trial court properly instructed the jury to accept Adam's testimony with great caution and to weigh it with care (Tr. 571-577; G. App. 233-238). See, Stanley, supra, at 638-639. The jury proceeded to exercise its assigned function and decided to credit at least a portion of Adam's testimony. There is no reason here to upset its determination.[5/]

5/ The defendant's reliance upon United States v. Brooks, 349 F. Supp. 168 (S.D.N.Y. 1972), does not suggest a contrary view. In Brooks, the district court granted a motion for judgment of acquittal, after a mistrial due to a deadlocked jury, on the ground that the government had failed to produce "substantial" evidence on a threshold issue. The court in reviewing the evidence on the contested issue concluded that where the governments theory of the case was contrary to an inference "which must be made" and was based on "totally inconsistent" evidence, which included testimonial conflicts among witnesses, "substantial evidence" which would support a conviction was not shown by the record. In the instant case, the testimony of Harvey Adam is not contradicted by other evidence presented to the jury. The issue presented by his testimony is one of internal consistency or credibility.

II

HARVEY ADAM WAS A COMPETENT WITNESS

In the court below, defendant used the testimony of FBI Agent McNamara about finding Adam disoriented in the office subsequent to the latter's appearance as a witness and the testimony of Dr. D'Apice concerning Adam's psychiatric treatment as a defense to the charge. This defense was designed to convince the jury that Adam's testimony was incredible and should not be believed. Defendant now contends that Adam was incompetent as a witness because he had taken drugs on the days that he had testified (Br. 11) and that Dr. D'Apice showed that Adam was having delusions and hallucinating at the time that he was testifying (Br. 12). We submit that the record does not support the claim that Adam had delusions and was hallucinating at the time that he was testifying and that he was a competent witness.

The competency of a witness to testify before the jury is a question of law and depends upon the witness' capacity to observe, remember, and narrate, as well as understand the duty to tell the truth. See District of Columbia v. Armes, 107 U.S. 519 (1882); 2 Wigmore, Evidence § 478, 492-501 (3d ed. 1940); Doran v. United States, 205 F.2d 717, 718 (D.C. Cir. 1953), cert. den., 346 U.S. 828 (1953); United States v.

Benn, 476 F.2d 1127, 1130 (D.C. Cir. 1972).[6] The determination of competency is within the trial judge's sound discretion, reversible only for a clear abuse. See United States v. Hicks, 389 F.2d 29 (3rd Cir. 1968), cert. den., 391 U.S. 970 (1968); United States v. Barnes, 368 F.2d 567 (4th Cir. 1966); United States v. Lee Wan Tam, 274 F.2d 863, 864-865 (2nd Cir. 1960), cert. den., 363 U.S. 803 (1960). Here, since the defendant did not specifically raise the issue of Adam's competency to testify, by objection or motion to strike after Dr. D'Apice testified, the trial judge was not asked to rule on Adam's competency and no specific finding by him appears in the record.[7] In these circumstances, we submit, this Court should follow the presumption that Adam was a competent witness. Stephen v. United States, 133 F.2d 87, 95 (6th Cir. 1943), cert. den., 318 U.S. 781 (1943). See 2 Wigmore, Evidence §484 (3d ed. 1940).

6/ Federal Rules of Evidence, January 2, 1975, Art. VI, Rule 601, 88 Stat. 1934, Pub. L. No. 93-595 (effective date - July 1, 1975) provides that:

> General Rule of Competency
>
> Every person is competent to be a witness except as otherwise provided in these rules. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.

7/ See 2 Wigmore, Evidence §586 (3d ed. 1940); United States v. Matanky, 482 F.2d 1319, 1324 (9th Cir. 1973), cert. den., 414 U.S. 1039 (1973); United States v. Del Purgatario, 411 F.2d 84, 87 (2nd Cir. 1969); United States v. Indiviglio, 352 F.2d 276 (2nd Cir. 1965), cert. den., 383 U.S. 907 (1966).

But, apart from any presumption, the record below does not show that Adam was incompetent. Rather, a reading of the testimony of Dr. D'Apice shows that Adam was competent. As we related in the statement, Dr. D'Apice testified that Adam could relate to the world, that he could recall matters of importance and that he would only have advised Adam not to testify because of stress.

Nor does the fact that Adam obviously was found disoriented after his testimony because of the effect of drugs mean that he was under the influence of drugs when he testified. He testified in open court under the eyes of the judge, counsel and the defendant and his conduct did not suggest at any time, that he was incapable of testifying. To the contrary, his two days of responding to questions indicates that he was in fact competent and that the drugs did not affect his testimony. Finally, the medical evidence was that the drugs that Adam took enabled him to function in a more balanced fashion (Tr. 410-413; G. App. 200-203).[8/] In short, as Dr. D'Apice's testimony shows, Harvey Adam could observe, recall and narrate the events to which he testified and he was capable of understanding the duty to tell the truth.

8/ The defendant's reference to United States v. Butler, 481 F.2d 531 (D.C. Cir. 1973) does not suggest a contrary result. The issue in Butler was whether or not the trial judge erred in not sua sponte ordering the physical and mental examination of a witness. In the instant case, the witness' physical and mental condition was fully explored.

CONCLUSION

It is therefore respectfully submitted that the judgment of conviction should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for Appellee have been served upon the attorney for appellant at the following address:

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Dated this 18th day of April, 1975.

David E. Roseberry

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